STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	:	
Initiating Proposed Rulemaking Relating to the Regulatory Accounting Treatment of Cloud-Based Solutions.	:	**17-0855**

ORDER

By the Commission:

I. Introduction

The Illinois Commerce Commission ("Commission") initiated this proceeding to consider amendments to the Commission's rules relating to the regulatory accounting treatment of cloud-based solutions in Illinois. The rule was proposed to be filed in Title 83, Chapter I, Subchapter b of the Illinois Administrative Code as Part 289 ("Proposed Part 289" or "Proposed Rule"). The Proposed Rule was published in the Illinois Register on November 1, 2019, initiating the first notice period pursuant to Section 5-40(b) of the Illinois Administrative Procedure Act ("First Notice Rule"). 5 ILCS 100/5-40; 43 Ill. Reg. 12237. This Order declines to adopt the modified Proposed Rule and declines to submit it to the Joint Committee on Administrative Rules pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act to begin the second notice period. Appendix A to this Order reflects the Proposed Rule addressed in this Order.

II. Procedural History

The Commission initiated this proceeding on December 6, 2017, to consider amendments to the Commission's rules relating to the regulatory accounting treatment of cloud-based solutions in Illinois. *Ill. Commerce Comm'n On Its Own Motion*, Docket No. 17-0855, Order Initiating Proceeding (Dec. 6, 2017) ("Initiating Order"). The Initiating Order directed that the matter be conducted as a rulemaking.

The following parties filed appearances or were given leave to intervene: Staff of the Commission ("Staff"); the Attorney General of the State of Illinois ("AG"); the Citizens Utility Board ("CUB"); Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor Gas"); North Shore Gas Company ("North Shore"); The Peoples Gas Light and Coke Company ("Peoples Gas"); Aqua Illinois, Inc. ("Aqua"); Illinois-American Water Company ("IAWC"); Commonwealth Edison Company ("ComEd"); Ameren Illinois Company d/b/a Ameren Illinois ("Ameren"); the Illinois Competitive Energy Association ("ICEA"); and Advanced Energy Economy Institute ("AEEI").

Staff hosted three workshops in which interested parties engaged in discussions regarding the scope and language of the new rule. On March 9, 2018, Staff filed initial

comments, including the language of the new proposed rule entitled "Regulatory Accounting Treatment for Cloud-Based Computing Solutions."

Various parties filed comments regarding the Proposed Rule. On March 26, 2018, the following parties filed initial comments regarding the Proposed Rule: AEEI, Ameren, Aqua, IAWC, Nicor Gas, North Shore, Peoples Gas, ComEd, the AG and CUB. On April 9, 2018, the following parties filed reply comments: AEEI, ComEd, Aqua, IAWC, Ameren, Nicor Gas, North Shore, Peoples Gas, the AG and Staff. CUB filed reply comments on April 10, 2018. A Proposed First Notice Order was issued on April 30, 2018. Staff, CUB, the AG, AEEI, Ameren, Aqua, IAWC, Nicor Gas, North Shore and Peoples Gas filed Briefs on Exceptions on May 7, 2018. Staff, CUB, AEEI, Ameren, Aqua, IAWC, Nicor Gas, North Shore and Peoples Gas filed Reply Briefs on Exceptions on May 14, 2018.

On May 31, 2018, the Commission issued a First Notice Order authorizing publication of the Proposed Rule. Notice of the rulemaking was published in the Illinois Register on July 6, 2018, initiating the first notice period pursuant to Section 5-40(b) of the Illinois Administrative Procedure Act ("IAPA"). 5 ILCS 100/5-40; 42 Ill. Reg. 12369.

During the first notice period, Staff proposed additional language for Section 289.40(c)(3). On January 9, 2019, the Commission entered a Second Notice Order ("Second Notice Order"), which included those changes, and the Proposed Rule was submitted to the Joint Committee on Administrative Rules ("JCAR") to begin the second notice period. 5 ILCS 100/5-40(c). At its June 11, 2019 meeting, JCAR objected to the proposed rulemaking. In its Statement of Objection, which the Commission received on June 17, 2019, JCAR explained that it was making the objection because it "ha[d] not yet received sufficient information regarding the economic impact of the rulemaking on affected ratepayers." On June 26, 2019, the Commission issued an order withdrawing the rulemaking to allow for time to address JCAR's objections.

In response to JCAR's objections, in a July 23, 2019 Report ("July 23 Staff Report"), Staff recommended amending Section 289.10 of the Proposed Rule to clarify the purpose of the Rule. The July 23 Staff Report also recommended that the Commission propose these amendments for the First Notice publication, because of the modest scope of the proposed amendments.

On August 7, 2019, the Commission, however, issued an order soliciting further comments before adopting Staff's proposed revisions and commencing the first notice period. The Commission noted that it "sees value in soliciting further information" and that "convening a public hearing will facilitate the submission of information that might not otherwise be submitted." 5 ILCS 100/5-40(b). On August 9, 2019, the Administrative Law Judge filed on e-Docket and served upon the parties a list of questions from the Commissioners. The Commission directed any person interested in responding to these questions to submit their comments and responses by August 23, 2019. The Commission received comments from Nicor Gas, ComEd, North Shore, Peoples Gas, Staff, Aqua, IAWC, Ameren, AG, and AEEI.

A Notice of Public Hearing was issued and served on the parties on August 26, 2019, noting that the scope of the hearing was limited to the economic impact of the Proposed Rule on affected ratepayers and responses to the Commissioners' August 9, 2019 questions. On September 6, 2019, the Commission convened the public hearing.

Representatives of the following entities participated in the hearing: AEEI, Oracle Utilities, Google LLC, AG, CUB, Staff. Also participating were representatives for the following utilities: Nicor Gas, ComEd, North Shore, Peoples Gas, Aqua, IAWC, and Ameren. During the hearing, the Commission invited any interested parties to file post hearing comments and suggest any amendments to the Proposed Rule by September 27, 2019. The Commission received post-hearing comments from the AG, CUB, Staff, AEEI. The utilities also filed joint comments on behalf of Ameren, IAWC, Aqua, ComEd, Nicor, North Shore and Peoples Gas.

Subsequently, the Commission entered a second First Notice Order on October 10, 2019 ("2019 First Notice Order"). On January 30, 2020, during the first notice period, Ameren, Aqua, IAWC, Nicor, North Shore and Peoples Gas filed the Verified Joint First Notice Comments ("Joint First Notice Comments"), and AEEI filed Verified Comments on First Notice Rule ("AEEI First Notice Comments"). Rather than submitting first notice comments on January 30, 2020, ComEd filed a motion seeking an extension of the first notice period ("ComEd's Motion"). ComEd stated that additional time would allow the parties to convene further workshops at which the stakeholders could discuss the First Notice Rule. In ComEd's Motion, ComEd suggested that the extension of time would allow the parties "to come together, evaluate the proposed rule, build consensus, and when necessary, come up with alternatives." ComEd's Motion at 2. ComEd's Motion was granted without objection and Staff convened two additional workshops.

On April 10, 2020, Ameren, ComEd, IAWC, Nicor, Aqua, North Shore and Peoples Gas (the "Joint Utilities") filed the Joint Utilities Response Comments. AEEI and Staff also filed response comments. As part of response comments, Staff filed an amended First Notice Rule as supported by Staff ("Staff's Proposed Rule"). Staff's Proposed Rule is a product of the additional workshops. Staff's Proposed Rule was circulated to all parties prior to the filing deadline for response comments. Parties were given leave to filed reply comments on April 17, 2020, however, no reply comments were filed as there appears to be a consensus on the modified Proposed Rule. A Proposed Second Notice Order was issued on May 8, 2020. No Briefs on Exceptions were filed.

III. Removal of "Third-Party"

A. Joint Utilities[1]

The First Notice Rule adds throughout the rule the new term "third-party," which it defines to mean "an outside service provider that is not an affiliate of the public utility." First Notice Rule, 83 Ill. Adm. Code 289.20. The Joint Utilities state that this addition is unnecessary and should be removed. The Joint Utilities point out that the First Notice Rule already defines cloud-based technologies as those "obtained from an *outside service provider's* servers." First Notice Rule, 83 Ill. Adm. Code 289.20 (emphasis added). The term "outside service provider" is defined in the First Notice Rule and explicitly excludes a public utility's affiliates. According to the Joint Utilities, the addition

[1] ComEd is included as part of the Joint Utilities, but the Commission notes that ComEd was not a sponsor of the Joint First Notice Comments. To the extent that the positions by the Joint Utilities are attributed to the Joint First Notice Comments, they are not necessarily the position of ComEd.

of the term “third-party” throughout the rule creates a repeated redundancy with the term “outside service provider” that renders the rule language confusing.

The Joint Utilities agree with Staff’s Proposed Rule that removes the redundant term “third-party”.

B. Staff

Staff agrees with AEEI and the Joint Utilities that the definition of and references to “third-party” should be removed from the rule because it is superfluous. Staff’s Proposed Rule removes the definition and various references to the term “third-party” from the First Notice Rule.

C. AEEI

AEEI agrees in principle that the accounting rules for cloud-based solutions should apply to those solutions provided by third parties that are not affiliated with Illinois regulated utilities. However, AEEI states that the term “outside services provider” already contains a similar concept and the term “third-party” is not necessary. AEEI supports Staff’s Proposed Rule.

IV. Section 289.20

Staff states that the definition of “service contract” in Section 289.20 includes a provision that states “[a]ny service contract extension or renewal shall be accounted for as a separate regulatory asset under this part.” Staff understands this provision is intended to convey that, if a contract extension or renewal is booked as a regulatory asset, it must be a separate asset and not combined with the contract that preceded it. However, Staff is concerned the term “regulatory asset” as used in this context could suggest that any and all contract extensions or renewals are regulatory assets. To address this concern, Staff proposes replacing “regulatory asset” with “service contract.”

No other party commented on this proposed amendment. The Joint Utilities and AEEI support Staff’s Proposed Rule, which includes this modification.

V. Section 289.40

A. Joint Utilities

Joint Utilities state that the First Notice Rule adopts a new cost breakdown requirement in Section 289.40 that would render the Proposed Part 289 impractical and unworkable. The Joint Utilities explain that, like prior iterations of the Proposed Rule, the First Notice Rule requires a public utility that records cloud-based computing costs to a regulatory asset under the rule to “ensure that each regulatory asset is associated with a specific service contract.” First Notice Rule, 83 Ill. Adm. Code 289.40(b)(3). In the Joint First Notice Comments, the Joint Utilities point out that the First Notice Rule further requires that “[s]uch service contracts, to the extent possible, break down various costs associated with the third-party cloud-based computing solutions that show the nature of these costs.” *Id.* It then lists the types of costs that a utility could incur related to computing technology. *Id.*

The Joint Utilities assert that the phrase “to the extent possible” is vague and unclear. It is not clear what evidence a utility would have to offer to prove that it is not

"possible" to itemize a service contract into subservices and corresponding costs. The Joint Utilities state this is particularly true when a services company or other utility affiliate, rather than the utility itself, enters into a contract.

The Joint Utilities also state that the cost breakdown requirement would negate the regulatory certainty that the Proposed Rule is intended to provide. Under Accounting Standards Codification 980-340-25-1, a utility must have reasonable regulatory assurance to record costs to a regulatory asset. According to the Joint Utilities, the First Notice Rule would require case-by-case, contract-by-contract litigation of whether a service contract can be disaggregated into subservices and costs; if not, why not; and if so, how the subservices and costs compare to an on-premises technology and its costs. The Joint Utilities note that a utility would have insufficient assurance of regulatory asset recovery of any of its cloud technology costs until after a fully-litigated rate case, thus rendering the rule ineffective. The Joint Utilities further claim that this increase in litigation will increase utilities' rate case expenses. Those rate case expenses would correspondingly increase over time as the number and types of cloud technologies available to and used by utilities are expected to increase over time.

Additionally, the Joint Utilities are concerned that the cost breakdown requirement could deter cloud software vendors from contracting with Illinois utilities. The Joint Utilities point to the concerns raised by AEEI in support of the negative impact this requirement may have on cloud technologies available in Illinois. The Joint Utilities further point out that the AG also recognized that a cost breakdown requirement would impose an undue burden on cloud software vendors that could in turn create problems for Illinois utilities and their customers. AG Post-Hearing Comments at 3 (Sept. 27, 2019).

In the Joint First Notice Comments, the Joint Utilities also state that the assumption that cloud service contracts can be segregated into subservices and costs that would directly align with on-premises technologies and costs misaligns with the benefits that cloud technologies provide. In those comments, the Joint Utilities explain that, while the ultimate functionality of a cloud-based and an on-premises computing solution may be comparable, how the cloud technology *delivers* that functionality is not comparable. The Joint Utilities state it is that difference that benefits the utility and its customers.

As a solution to the issues presented by the cost breakdown requirement, the Joint First Notice Comments propose an amendment to Section 289.40(a) to address the Commission's apparent concern that the rule should not allow utilities to capitalize more costs for cloud technologies than they capitalize for on-premises technologies per General Accepted Accounting Principles. Specifically, the Joint Utilities recommend in the Joint First Notice Comments that Section 289.40(a) be revised to state that 80% of cloud computing costs could be recorded as a regulatory asset. This was followed by a statement that all other costs associated with cloud computing solutions should be recorded in accordance with financial accounting requirements, Commission practice, rules and laws. For consistency purposes, the Joint Utilities then propose deleting the new Section 289.40(b)(2) in its entirety, revise Section 289.40(b)(3), and include corresponding updates to the subsection numbering.

Furthermore, the Joint Utilities recommend a revision to Section 289.40(b)(1) to address an issue regarding prepayment of cloud-based solutions. The Joint Utilities

explain that the previous Second Notice Order recognized that the rule "allows for utilities to either prepay or pay periodically for cloud-based computing solutions." Second Notice Order at 18 (Jan. 9, 2019). The Joint Utilities agree with the Commission's position; however, as currently written, the Joint Utilities believe the First Notice Rule remains unclear whether prepayments are included. Accordingly, the Joint Utilities propose a revision to Section 289.40(b)(1) to expressly address prepayments.

Two workshops were held after the Joint Utilities filed the Joint First Notice Comments. Staff's Proposed Rule adopts many of the Joint Utilities recommendations regarding Section 289.40, including the 80% capitalization recommendation. In the Joint Utilities Response Comments, the Joint Utilities state they support Staff's Proposed Rule. The Joint Utilities assert that Staff's amendments to the First Notice Rule add clarity, will streamline administration of the Proposed Rule, and will further promote additional benefits to customers, harnessing the "flexibility, efficiency, and scalability of cloud-based solutions," thus enabling "additional function at lower costs" and "improv[ing] reliability and resiliency." 2019 First Notice Order at 5. The Joint Utilities recommend one modification to Staff's Proposed Rule. The Joint Utilities recommend that Section 289.40(a) of Staff's Proposed Rule be revised as follows:

> A public utility may record as a regulatory asset and, subject to the Commission's determination of prudence and reasonableness in a rate case, include in rate base eighty percent (80%) of the costs ~~paid to~~ incurred from an outside service provider . . .

The Joint Utilities state that this revision comports with the use of the word "incurred" instead of "paid" in two other locations in the Proposed Rule.

B. Staff

Staff notes that AEEI initially proposed use of a fixed percentage to determine the amount of cloud computing costs a utility would be allowed to capitalize rather than require a utility to break down various costs of cloud computing solutions. AEEI First Notice Comments at 7-8. Similarly, the Joint Utilities propose that the rule be revised to allow utilities to capitalize 80% of the costs of cloud computing rather than break down those costs. Joint First Notice Comments at 2. In support of the proposal to capitalize 80% of cloud computing costs, the Joint Utilities argue this approach would "clarify the rule and negate the need for case-by-case, service contract-by-service contract litigation of cloud technology costs, thus promoting regulatory certainty and controlling rate case expenses." Joint First Notice Comments at 2. Staff believes this approach is a well-reasoned solution. It would address the Commission's concern that Operations and Maintenance ("O&M") costs could be capitalized for a cloud computing solution but expensed for an on-premises solution. This approach would also address the Joint Utilities' concern that the rule as proposed provided no regulatory certainty and could result in more scrutiny for cloud computing costs than for similar on-premises costs. Joint First Notice Comments at 1.

After extensive discussions in the workshops and input from the individual utilities and interested parties, Staff supports the Joint Utilities' proposal to implement an 80/20 split of capitalized costs versus expensed costs for cloud computing and believes it

closely mirrors the proportion of costs the utilities currently experience for on-premises solutions. However, Staff supports additional changes to the language originally proposed by the Joint Utilities in the Joint First Notice Comments.

First, Staff recommends that the phrase “paid to an outside service provider” should be inserted to clarify that the costs at issue are those for the cloud computing contract itself and not costs incurred for services provided by the utility or an affiliate.

Second, Staff proposes that the accounting treatment for costs not included in the 80%, in other words, the remaining 20%, should be clarified. As originally proposed by the Joint Utilities, Section 289.40(a) stated that 80% of cloud computing costs could be recorded as a regulatory asset. This was followed by a statement that all other costs associated with cloud computing solutions should be recorded in accordance with financial accounting requirements, Commission practice, rules and laws. In the workshops, parties noted that, while the intention of addressing “all other costs” was to capture costs ancillary to the cloud computing contract, as written, “all other costs” could be interpreted to mean the remaining 20% of the cloud computing contract costs. To eliminate this confusion, Staff supports the addition of a sentence specifying that the remaining 20% of costs paid to an outside service provider should be recorded as an operating expense.

Third, Staff states that examples of the types of costs that are ancillary to the cloud computing costs addressed by the 80/20 split should be added, together with language explaining that those ancillary costs will be expensed or capitalized according to standard accounting practices.

Section 289.40(a), as modified and as supported by Staff, reads as follows:

> A public utility may record as a regulatory asset and, subject to the Commission's determination of prudence and reasonableness in a rate case, include in rate base eighty percent (80%) of the ~~those~~ costs paid to an outside service provider for a ~~associated with third-party~~ cloud-based computing solution~~s~~ or computing service ~~that would be recorded to a utility plant account in accordance with financial accounting requirements if the costs were for an on-premises computing solution, rather than a third-party cloud-based computing solution,~~ if all the requirements in subsection (b) are met. The remaining twenty percent (20%) of such costs shall be recorded as an operating expense. All other costs associated with ~~third-party~~ a cloud-based computing solution~~s~~ or computing service, including but not limited to, implementation costs, training costs, and data conversion costs, shall be included in rate base or recorded as an operating expense ~~or be recorded~~ in accordance with financial accounting requirements, Commission practice, rules, and law.

In addition, Staff supports a change recommended by the Joint Utilities to 289.40(b)(1) to clarify that prepayments made during the period being reported may be included in the regulatory asset.

Further, Staff supports changes to Part 289.40(b)(2) and Part 289.40(b)(3) to conform to the changes to Part 289.40(a). Specifically, 289.40(b)(2) should be stricken in its entirety, and all but the first sentence of 289.40(b)(3) should be stricken; the remaining sections should be renumbered accordingly. Staff explains that these changes are proposed because the 80/20 split obviates the need for a utility to provide additional proof, as contemplated by 289.40(b)(2), as well as the need to break down the costs of a cloud computing contract into line-item components, as contemplated by 289.40(b)(3).

Finally, Staff supports updates to the reporting requirements set forth in Section 289.40(b) to extend those requirements through 2025. As previously written, the reporting requirements anticipated a 2019 effective date for the new rule.

C. AEEI

AEEI states that an unintended consequence of the First Notice Rule is that the language in Section 289.40 creates a new standard of review for utility costs that adds risk to utilities in recovering capital costs for cloud-based solutions. AEEI asserts the new language creates a risk unique to cloud-based solutions that once again leaves the playing field unlevel.

AEEI points out that many stakeholders at the September 6, 2019 public hearing raised concerns with requiring a breakout of cloud provider costs so that they could be functionalized and either capitalized or expensed based on a comparison to on-premises systems costs. AEEI concurs with the concern expressed at the public hearing that Part 289.40, as written at the time, creates ambiguity around which costs associated with a cloud computing solution will be recorded as capital. AEEI believes the First Notice Rule exchanges that initial ambiguity for new (and possibly broader) ambiguity and risk. Instead of requiring an accounting process that the record reflects is impractical for fitting cloud-based solution providers' costs into a utility cost-of-service accounting system, the AEEI First Notice Comments proposes that the rule should instead allow for a fixed percentage of total cloud computing costs that a utility would be allowed to capitalize. According to AEEI, this fixed percentage would be based on the average percentage of capital costs associated with historical on-premises IT investments. Essentially, the Commission would adopt a ratio of capital expense to operating expense based on the historic experience of Illinois utilities in their on-premises solution development.

As a result of the workshops, AEEI states in its response comments that AEEI supports Staff's Proposed Rule that amends the First Notice Rule and adopts a version of the Joint Utilities' proposal regarding this issue. AEEI explains that Section 289.40(b) of the First Notice Rule would have required utility contracts with cloud computing providers to breakout, to the extent possible, the internal costs of cloud providers to supply services. Utilities would then need to compare the function of these costs to comparable utility on-premises system costs to guide their decisions on the treatment of such costs as either capital or operating expense. The First Notice Rule also states that the utilities have the burden of proof in a rate case to prove the counterfactual that any costs recorded

as a regulatory asset "would be recorded to a utility plant account if these costs were for an on-premise computing solution."

AEEI believes that the new language in the First Notice Rule was intended to provide clarity on what costs could be capitalized and recorded as regulatory assets. However, in practice, AEEI states that it would not have accomplished those goals and would have discouraged the use of the rule, which remains optional for utilities. According to AEEI, cloud computing providers generally do not account for their costs of providing service in the same manner as a utility would. Even if cloud computing providers did, they charge competitive, market-based prices to utilities that are not directly related to the costs (no matter how allocated) of providing a service. Setting aside the issue of reconciling market prices and provider costs, AEEI asserts that if cloud providers were able to provide the underlying costs of service, utilities would have difficulty comparing the functions of costs with the costs of an on-premises system. AEEI states that cloud-based solutions and on-premises systems do not necessarily work in the same way, in the sense that the solutions do not lend themselves to the same structure of cost functionalization even for cost-based providers. Cloud providers and utilities would have to go through multiple layers of subjective interpretation to translate cloud computing provider costs and market-based prices charged to utilities into a categorization that would be useful for utility accounting purposes. According to AEEI, utilities would then need to use this subjective interpretation of costs to fulfill their new burden of proof under the First Notice Rule, creating clear risks for utilities if their accounting determinations were ever challenged.

Rather than using the internal costs of a cloud solution provider and necessitating a problematic translation into information utilities can use to inform their accounting for costs, AEEI states that Staff's proposed language instead allows for a fixed 80% of the cloud solution costs paid to an outside provider to be capitalized as a regulatory asset. The remaining 20% of cloud solution costs would be recorded as operating expense. The 80% is based on a utility analysis of past on-premises system costs, which shows that utilities typically capitalize 80% of on-premises system costs under existing accounting rules. AEEI asserts that the information reviewed informally in this docket supports a higher capitalization, but 80% is a conservative yet still reasonable allocation.

In AEEI's view, this focus on utility on-premises system costs rather than costs internal to cloud providers has a number of benefits. First, the breakdown of utility on-premises system costs between capital and operating expense can be determined through the relatively objective application of existing accounting standards. It eliminates controversy and potential litigation compared to the current language in the First Notice Rule. This in turn decreases risk and uncertainty about how utilities will recover their cloud service costs. Additionally, a fixed percentage is simple for utilities to implement and is less time consuming for regulators and intervenors to monitor.

AEEI states that the disincentive embedded in current accounting rules arises from the earnings that a utility forgoes when it chooses a cloud-based solution instead of an on-premises system. The capitalizable costs of an on-premises system drive the earnings for a utility. Therefore, according to AEEI, in order to set the earnings potential of cloud-based solutions equal to that of a on-premises systems, it makes sense to use the capitalization rate of on-premises systems as the appropriate benchmark.

In contrast, the First Notice Rule's current approach of basing the capitalization rate on the internal costs of a cloud-based solution would not necessarily eliminate the disincentive for utilities to utilize cloud-based solutions in every situation. Take for instance a hypothetical situation where utilities were able to apply their accounting rules to the internal costs of a cloud solution, and the results yielded a capitalization rate that was significantly lower than what is typical for an on-premises system. In this instance, the cloud solution would remain at an accounting-driven financial disadvantage compared to an on-premises system alternative, regardless of the potential merits of the cloud-based solution. Conversely, AEEI states, it is also possible that the internal costs of a cloud solution might yield a higher capitalization rate than a utility expects with an on-premises system. In this hypothetical situation, AEEI explains, the First Notice Rule as written would provide more earnings to utilities (and thus higher costs to customers) than are necessary to overcome the disincentive associated with investing in a cloud-based solution. In AEEI's opinion, Staff's language would more closely match earnings with what utilities generally expect with an on-premises solution, instead of under or overshooting the target based on the situation as would occur with the current language of the First Notice Rule.

VI. Commission Analysis and Conclusion

The only comments filed during the first notice period were by the Joint Utilities, Staff, and AEEI. These comments indicate that Staff and stakeholders have concerns with the First Notice Rule's cost breakdown requirement. The parties believe that the unintended consequence of the First Notice Rule would place a burden on utilities that would effectively render the rule impractical, thus frustrating the purpose of this rulemaking to "level the playing field" between on-premises and cloud-based computing solutions.

The Commission finds, however, that Staff's Proposed Rule is not supported by the record nor does it address the Commission's concern regarding capitalization of O&M costs as well as the Joint Utilities' concerns with regulatory uncertainty and heightened scrutiny for cloud computing solutions.

The Commission finds the proposed 80/20 split of the costs of cloud computing arbitrary and not supported by the record. It runs contrary to the Commission's obligation to assure proposed rates are "just and reasonable" and "least-cost" as required by Sections 9-101 and 8-401 of the Public Utilities Act. 220 ILCS 5/9-101; 220 ILCS 5/8-401. Instead, the 80/20 split is based on a few sporadic examples by certain utilities, rather than a sufficient set of data points, common industry practice, or an average break down of the cloud computing solutions' costs in Illinois based on Illinois utilities' extensive empirical data. Such arbitrary, regulatorily set split of the costs provides little oversight and contemplation for the Commission into cloud computing spending by the utilities and impairs the Commission's ability to review such costs. The proposed rule also fails to

adequately contemplate and quantify the impacts on the consumers as charged by JCAR's Statement of Objection.[2]

The Commission believes that cloud computing solutions are undeniably an important way forward for the Illinois utilities, that can provide many efficiencies, improve reliability and significantly cut costs. The Commission is encouraged to see that more and more utilities are taking advantage of cloud-based solutions without this rule in place. The Commission does not see this rule, as written, as necessary to the proposed task of "leveling the playing field" for cloud-base services. Notably, FASB's existing accounting standards[3] remain available to the utilities to recover their cloud-based solutions' costs. FASB's rules represent generally accepted accounting principles that address the conditions and requirements for capitalizing costs and expensing costs associated with cloud computing services. The Commission agrees that these rules will adequately address the changes or cancellation of cloud computing service contracts. *See e.g*. AG. Supp. First Notice Comm, 7. The aim of this docket was to improve on those mechanisms in a way that provides additional benefits to the consumers, which the proposed rule language simply fails to do. If the proposed rule fails to improve on the existing accounting principles in a way that benefits Illinois consumer, it is, then, better for the industry if we do not tinker with them and just stay consistent with the existing nationally accepted principles to avoid confusion and inconsistencies, particularly in light of any potential future updates.

The Commission also notes that the timing of this rulemaking is not appropriate, given the current crisis that Illinois faces during the COVID-19 global pandemic. Under the Commission's June 18, 2020 Order in Docket No. 20-0309, the Commission will be determining how to deal with mounting uncollectibles. It is not possible to predict how these uncollectibles will impact rates in the coming years. Likewise, it's not clear from the record, what the impact on rates will be under the rule as written. Additional uncertainty in rates in the next couple of years may be detrimental, as consumers grapple with their own economic uncertainty. The Commission, also notes that due to the rapid pace of technological changes, many findings and much of the information in this docket, collected since 2017, are outdated and not a good source of information to base the language of the rules. Thus, the Commission finds that this rulemaking shall be closed, rather than placed on hold.

Considering the above, the Commission declines to adopt the proposed new 83 Ill. Adm. Code 289 and declines to submit it to the Joint Committee on Administrative Rules pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act to begin the second notice period. The Commission finds that because it is hard to predict when and

[2] In its Statement of Objection, which the Commission received on June 17, 2019, JCAR explained that it was making the objection because it "ha[d] not yet received sufficient information regarding the economic impact of the rulemaking on affected ratepayers."

[3] FASB Accounting Standards Update 2018-15, Intangibles—Goodwill and Other – Internal-Use Software (Subtopic 350-40), Customer Accounting for Implementation Costs Incurred in a Cloud Computing Arrangement that is a Service Contract.

whether this matter should be reexamined in the future, this docket shall be closed, rather than placed on hold.

VII. Findings and Ordering Paragraphs

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction over the subject matter herein;

(2) the recitals of fact set forth in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

(3) the proposed new rule, established as 83 Ill. Adm. Code 289, should not be adopted as it lacks necessary consumer protection mechanisms; and

(4) this docket, thus, shall be closed.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proposed new 83 Ill. Adm. Code 289 shall not be adopted and shall not be submitted to the Joint Committee on Administrative Rules pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act to begin the second notice period.

IT IS FURTHER ORDERED that this docket shall be closed.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 15th day of July, 2020.

(SIGNED) CARRIE ZALEWSKI

Chairman

Commissioners Bocanegra and Oliva dissent.